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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GIANE MARQUISE LOLLAR,

Defendant and Appellant.

B210495

(Los Angeles County
Super. Ct. No. TA068842)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Gary E. Daigh, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Daniel C. Chang and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Giane Marquise Lollar of two counts of premeditated attempted murder and two counts of assault with a firearm. The jury also found true several special allegations, including gang enhancements. Appellant contends: (1) the trial court erred in denying his motion for a new trial; and (2) he received ineffective assistance of counsel due to his counsel's failure to object to the testimony of a gang expert and the failure to object to alleged prosecutorial misconduct. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We review the evidence in accordance with the usual rules on appeal. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) Where relevant, we have incorporated the background as set forth in our unpublished opinion in appellant's codefendant's appeal, *People v. Gonzalez* (Jan. 28, 2010, B208717).

Counts 1 through 6

One morning in late September 2006, Rodney Beverly was at a liquor store in Lynwood.¹ He heard gunfire while at the purchase counter. Another man who had just walked into the store dropped to the floor. He looked up and told Beverly, "You got hit." A bullet or bullet fragment hit Beverly in the throat near his Adam's apple. A bullet fragment was later removed from Beverly's neck.

Police Officer Marlon Williams was parked close to the liquor store when he heard four or five gunshots nearby. He drove in the direction of the shots and saw appellant and codefendant Jose Gonzalez sitting in a car in front of the store. The two men were looking at the store. When they turned away, the driver—Gonzalez—saw Officer Williams and looked surprised. Gonzalez drove away from the liquor store. Officer Williams followed. Officer Williams then turned on his patrol car's forward red lights to attempt a traffic stop. The car crossed a double yellow line, southbound into northbound traffic, then turned and drove eastbound against westbound traffic. Officer

¹ Beverly was murdered shortly before the trial. His testimony from the preliminary hearing was read to the jury.

Williams initiated a pursuit. The car did not stop at stop signs or traffic signals and drove close to 50 miles per hour in a residential neighborhood with a 25 miles per hour speed limit. The car pulled up to a large apartment complex and appellant got out. He was wearing blue shorts. Officer Williams put out a description of appellant on his radio and continued to follow Gonzalez in the car. Following a foot chase through the apartment complex, Gonzalez was eventually stopped by the police.

Meanwhile, other officers searched for appellant. A resident in the apartment complex told deputy sheriffs she saw a man in blue shorts digging in the ground and burying something. She showed a deputy the spot where the item was buried. The deputy kicked away dirt and discovered a gun in a sock. Deputy sheriffs searching the area found appellant. He was still wearing blue shorts and had streaks of mud or dirt on his arms and hands. Although appellant was walking, he was out of breath and sweating. A criminalist examined the bullet fragment removed from Beverly's neck and the gun that was buried at the apartment complex. At trial, he opined that the bullet fragment came from the gun that had been buried.

Counts 7 and 8

Gonzalez was also charged with attempted murder based on a shooting that did not involve appellant. The charges were consolidated for trial. The jury heard evidence that in July 2006, Gonzalez approached two people in front of a house, asked where they were from, then shot at them, stating that the shooting was for "East Side Mob." One of the victims later identified Gonzalez from a photographic lineup.

Gang Evidence

Detective Gina Cabrera testified as a gang expert at trial. Based on police reports written by other officers, as well as Gonzalez and appellant's tattoos, Detective Cabrera opined that appellant was a member of the Lueders Park Piru gang, and Gonzalez a member of the East Side Mob Piru gang (Mob Piru). Gonzalez used the moniker "Ghetto Boy," and appellant the moniker "Rambo." Appellant had the number "577" tattooed on his arm, which corresponded to "LPP," the initials of the Lueders Park Piru gang. According to Detective Cabrera, the Mob Piru and Lueders Park Piru gangs are allies,

and it is common for their members to commit crimes together. Detective Cabrera identified Mob Piru's primary activities as narcotics related crimes, assaults with deadly weapons, murders, attempted murders, and robberies. She stated Lueders Park Piru engaged in similar activities. The People introduced evidence of convictions of two Lueders Park Piru gang members for attempted robbery and possession of a firearm while being a felon, and convictions of two Mob Piru gang members for possession of cocaine base for sale and possession of a firearm while being a felon.

Detective Cabrera was presented with hypotheticals outlining the facts of each incident as established at trial. Based on the hypothetical mirroring the facts of the September 2006 incident, Detective Cabrera opined the shooting was committed to benefit a gang. She explained:

"I believe [the shooting was committed to benefit a gang] for the mere fact that the crime that was committed was a violent crime. It was used with a gun so the tendency for murder is very high. The mere fact that the individuals drove around their gang territory kind of in a manner of, 'Hey, other fellow people, look at me. Other gang members look at me. We are kind of driving around kind of in a way to avoid capture' gives them a little bit of notoriety. The mere fact that they ran into an apartment complex that is known to house or where a lot of -- a hangout for gang members of the Mob Piru gang. [¶] . . . [¶] The fact being that there are other gang members in that area from different gangs it basically lets them know that these individuals, this gang is not afraid of committing a crime so violent as attempted murder in midday right in front of other gang members."

Detective Cabrera also opined that the July 2006 shooting was committed to benefit Gonzalez's gang.

Verdict and New Trial Motion

The jury found appellant guilty of two counts of premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664)² and two counts of assault with a firearm (§ 245, subd. (a)(2)). The jury also found true the following special allegations: personal and

² All further statutory references are to the Penal Code.

intentional discharge of a firearm (§ 12022.53, subd. (c)), personal use of a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)); gang enhancements (§ 186.22, subd. (b)(1)(C)); personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)); and personal infliction of great bodily injury (§ 12022.7).³

Before sentencing, appellant requested that he be allowed to represent himself. The trial court granted the motion but appointed appellant's former counsel as standby counsel. Later, appellant's former counsel was reappointed to represent him. At an August 2008 sentencing hearing, appellant moved for a new trial.⁴ The trial court sua sponte considered whether there was sufficient evidence to support the verdict, and concluded there was. Appellant then raised two additional points. First, appellant explained: "I didn't have a fair trial from the get-go by being consolidated with a case I wasn't charged with. [¶] . . . [¶] . . . I went to trial on a case I had nothing to do with and his evidence had to be involved with my case, so it was highly inflammatory to the jury. [¶] . . . [¶] . . . In which the district attorney based the gang allegation on that because the gang was being shouted out on that crime and it's no type of in evidence which this crime was being for the gang." On a second related point, appellant argued: "There is no specific evidence to prove this crime was committed by the gang. For the jury hearing this gang is committing it for the crime, this crime have to be committed by the gang too. By me not going to trial with them probably would have been a different result." The trial court denied the new trial motion.

³ Gonzalez was also found guilty on all counts and special allegations charged against him, including those relating to the July 2006 shooting.

⁴ Although appellant was allowed to represent himself at sentencing, he later requested a continuance so that he could hire private counsel. The trial court granted the continuance, but stated that if appellant did not hire private counsel by the next hearing, his previous counsel would be reappointed to represent him. At the next hearing in August 2008, appellant had not hired other counsel so his original counsel appeared on his behalf. However, as the court proceeded with sentencing, appellant asked to address the court directly and requested permission to make a "verbal retrial motion." Appellant, rather than his counsel, argued the new trial motion.

Appellant was sentenced to an aggregate term of life with the possibility of parole, plus 45 years to life. This appeal followed.

DISCUSSION

I. New Trial Motion

Appellant contends the trial court should have granted his motion for a new trial because the court erred in allowing the two sets of charges to be consolidated, and in denying dual juries or bifurcation of the gang allegations. We agree with respondent that appellant forfeited these claims by failing to raise them in the trial court. We further conclude that even had appellant preserved the issues for review on appeal, we would find he was not denied a fair trial and the court properly denied his motion for a new trial.

A. Objection to Consolidation

Appellant generally argues the denial of the new trial motion was prejudicial and violated his right to a fair trial. In that context, appellant contends evidence of Gonzalez's involvement in the July 2006 shooting was inflammatory and made it impossible for appellant to receive a fair trial. To the extent appellant is arguing on appeal that the trial court improperly denied his motion for new trial based on the contention that the two sets of charges should not have been consolidated, appellant did not timely raise the issue and the motion was properly denied.

Section 1181 sets forth several statutory grounds on which a court may grant a new trial. Courts have also granted new trials for nonstatutory reasons on limited grounds. "A review of the principal cases creating exceptions to the exclusive statutory grounds disclose a narrow principle has emerged: new trials may be ordered for nonstatutory reasons when an error has occurred resulting in the denial of defendant's right to a fair trial, *and* the defendant has had no earlier opportunity to raise the issue." (*People v. Mayorga* (1985) 171 Cal.App.3d 929, 940.) Here, appellant had the opportunity to object to the consolidation of the two sets of charges before his motion for new trial. His codefendant raised the issue by opposing the motion for consolidation. Appellant neither joined in Gonzalez's motions or arguments, nor opposed consolidation

on his own until the motion for new trial. As a result, the trial court properly denied the motion for new trial.

Moreover, even had it been proper for the trial court to consider appellant's severance argument for the first time in a new trial motion, we would find the court did not abuse its discretion in denying the motion and that appellant was not denied a fair trial because of the consolidation of the charges. (*People v. Soper* (2009) 45 Cal.4th 759, 783 (*Soper*); *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27; *People v. Cook* (2006) 39 Cal.4th 566, 583.) The charges against Gonzalez in the July 2006 shooting were not particularly inflammatory when compared with the charges against both defendants in the September 2006 shooting. Both attempted murders were equally serious, with similar outcomes. Neither incident alone was likely to inflame the jury against appellant, rendering the jurors unable to separately consider the evidence of the other incident. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1245 [evidence of separate charges was equally inflammatory].)

Further, there was little "spillover" from linking a weak case with a stronger one. (*Soper, supra*, 45 Cal.4th at p. 781.) In the September 2006 incident, a police officer saw appellant and Gonzalez near the scene of the shooting immediately after shots were fired. There was evidence that appellant jumped out of the car and buried the gun that matched the bullet fragments extracted from Beverly's neck. The case against appellant was not weak. In addition, it was clear that appellant was not involved in the July 2006 shooting. As in *People v. Mendoza* (2000) 24 Cal.4th 130, 163, "the consolidated offenses were factually separable. Thus, there was a minimal risk of confusing the jury or of having the jury consider the commission of one of the joined crimes as evidence of defendant's commission of another of the joined crimes."

Appellant contends the prejudice resulting from the consolidation of the two sets of counts was evident in the jury's otherwise unjustifiable conclusion that the evidence established appellant had the requisite intent for attempted murder. Appellant argues that absent the prejudicial effect of the evidence of the July 2006 shooting, the jury could not have ruled out the possibility that appellant had only the intent to shoot or disable, rather

than the intent to kill. We disagree. The evidence demonstrated that appellant shot into the liquor store while it was occupied by two customers, one customer dove to the ground, and a bullet hit Beverly in the neck. Appellant and Gonzalez were looking directly into the liquor store when Officer Williams spotted them. There was substantial evidence that appellant had the requisite intent to kill. (*People v. Leon* (2010) 181 Cal.App.4th 452, 463-465.) There is no basis to conclude that the jury's conclusion on intent was the result of prejudice due to spillover from the evidence of the July 2006 shooting.

Even with respect to the gang allegations, the difference in the strength of the two cases was not so great as to render the joint trial fundamentally unfair. The gang expert identified several factors upon which she based her opinion that the September 2006 shooting was carried out for the benefit of a gang, including the time and location of the shooting, the past crimes committed by members of the two gangs in concert, and the manner in which appellant and Gonzalez carried out the shooting and subsequent flight. This testimony was significant, if not as immediately obvious as Gonzalez's gang-related statements during the July 2006 shooting. And any spillover effect of the July 2006 gang allegations was minimized by the lack of any evidence or suggestion that appellant or his gang were involved in the July 2006 shooting.

B. Dual Juries or Bifurcation

Appellant also contends the trial court erred in denying his motion for a new trial based on the court's earlier denial of Gonzalez's motion for dual juries or bifurcation of the gang allegations. Appellant forfeited these arguments by failing to raise them at any point below and, even had appellant preserved these issues for review on appeal, we would find no reversible error.

In January 2008, before the trial began, Gonzalez requested dual juries for the two separate incidents in which he was charged.⁵ He argued the trial would combine a very

⁵ Gonzalez's counsel had previously opposed the People's motion to consolidate the two cases in which Gonzalez was charged. The trial court granted the motion to

weak case with a stronger one and that the gang allegations in one case would spill into the other case, making it impossible for him to receive a fair trial from a single jury. The trial court denied the motion, which it construed either as a motion for separate juries or to bifurcate the gang allegations. Appellant did not join in the motion.

When appellant made his motion for a new trial, he did not raise the court's rulings on Gonzalez's motion for separate juries or bifurcation of the gang allegations as the basis for the new trial motion. Instead, appellant challenged the trial court's decision to allow the two sets of counts to be joined ("I didn't have a fair trial from the get-go by being consolidated with a case I wasn't charged with"), and he made a second claim that appeared to challenge the sufficiency of the evidence to support the gang enhancement findings ("There is no specific evidence to prove this crime was committed by the gang").

Appellant never objected to the trial court's rulings on Gonzalez's motion for separate juries or bifurcation of the gang allegations. He did not join Gonzalez's original motions or separately ask for similar relief. (*People v. Wilson* (2008) 44 Cal.4th 758, 793 [failure to join in the objection of a codefendant forfeits the issue on appeal unless objection would be futile]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [defendant's failure to join codefendant's motion for severance waived defendant's objection on appeal based on court's denial of codefendant's motion].) He also did not assert either ground as a basis for his motion for new trial. Appellant therefore forfeited these issues on appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 808, fn. 22 [failure to raise certain grounds in a motion for new trial forfeited such claims on appeal]; *People v. Williams* (1957) 153 Cal.App.2d 21, 25 [grounds for granting new trial may not be presented for the first time on appeal].)

Even had appellant preserved the issues of dual juries or bifurcation of gang allegations, we would conclude there was no prejudicial error. Regarding dual juries, this

consolidate. There is no indication in the record that appellant similarly opposed the motion to consolidate.

was not a case in which the prosecution introduced statements from Gonzalez that implicated appellant. Instead, Gonzalez's request for dual juries was intended to address the same concerns raised by a request for severance: the problems of linking a strong case with a weak case, or the dangers of prejudicial spillover from one case to another. As we previously discussed with respect to appellant's argument that the two sets of counts should not have been consolidated, we find appellant was not denied a fair trial because the evidence relating to both the July and September incidents was heard in one trial, and by a single jury.

Likewise, the trial court's refusal to bifurcate the gang allegations was not an abuse of discretion and did not render appellant's trial fundamentally unfair. Evidence of appellant's gang membership was relevant to the September 2006 shooting on the issues of motive and specific intent. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) In addition, the People did not introduce any particularly inflammatory gang evidence specifically related to appellant. The gang evidence admitted at trial was relatively limited, and, as discussed below, we conclude substantial evidence supported a true finding on the gang enhancements. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 227-228 [denial of bifurcation of gang allegations was abuse of discretion where substantial evidence did not support enhancements and much of gang evidence was extensive, irrelevant, and inflammatory].)

We find no error in the trial court's denial of appellant's motion for a new trial.⁶

II. No Prejudicial Ineffective Assistance of Counsel

Appellant contends he was prejudiced by ineffective assistance counsel because his attorney failed to object to the gang expert's testimony or to alleged prosecutorial misconduct. We find no ineffective assistance of counsel.

To establish entitlement to relief based upon a claim of ineffective assistance of counsel, the burden is on the defendant to show "(1) trial counsel failed to act in the

⁶ We also note that in appellant's codefendant's appeal (*People v. Gonzalez, supra*, B208717), we rejected arguments that the trial court erred in denying Gonzalez's request for dual juries, bifurcation of the gang allegations, or severance of the charges.

manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; *Strickland v. Washington* (1984) 466 U.S. 668.) A defendant establishes a reasonable probability of a more favorable determination when he persuades a reviewing court that the result of his trial was fundamentally unfair or unreliable. (*Strickland, supra*, at p. 694.)

Where the record on appeal "sheds no light" on why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless there could be "no satisfactory explanation" for counsel's actions. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.) Where the record does not illuminate the basis for a challenged act or omission, a defendant's claim of ineffective assistance of counsel is more appropriately made in a petition for habeas corpus where there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner challenged. (*Ledesma*, at p. 746.)

A. Failure to Object to the Gang Expert Testimony

Appellant contends he was denied effective assistance of counsel when his attorney failed to object to a portion of the gang expert's testimony. When explaining her opinion that the facts of the September 2006 shooting established the crime was committed to benefit a gang, the expert stated: "I believe [the shooting was committed to benefit a gang] for the mere fact that the crime that was committed was a violent crime. It was used with a gun so the tendency for murder is very high."

On appeal, appellant asserts the expert's use of the word murder "improperly defined attempted murder, opined attempted murder had been committed, and opined defendant was guilty thereof." Appellant argues his counsel should have objected to the statement. However, "the mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel. [Citation.]' [Citation.]" (*People v. Dickey* (2005) 35 Cal.4th 884, 914.) The record does not indicate why appellant's counsel did

not object to this statement and we cannot conclude on the record before us that counsel could not have had an acceptable reason for not objecting.

As it was, the expert's statement was fairly ambiguous and unclear. The question the expert was answering was whether the hypothetical shooting described to her could be characterized as benefitting a gang, not whether the facts described an attempted murder, or whether in her opinion appellant was guilty of attempted murder. In that context, the expert's statement may have been intended as an explanation of her opinion that the crime was a "violent crime," in that the defendants used a gun. In any event, appellant's counsel could reasonably have decided that objecting to the expert's statement would draw more attention to it than would be useful, or that an objection would allow the expert to clarify an otherwise unclear, and perhaps unhelpful, opinion. (*People v. Catlin* (2001) 26 Cal.4th 81, 165 [the decision whether to object or seek an admonition regarding testimony is highly tactical and "depends upon counsel's evaluation of the gravity of the problem and whether objection or other responses would serve only to highlight the undesirable testimony"].)

Even if counsel's performance was deficient because he failed to object, it is not reasonably probable that the outcome of appellant's trial would have been different had his counsel objected to this sole expert statement. As to the gang allegations, the expert identified several other factors to explain her opinion that the shooting was committed to benefit a gang, including the manner in which the shooting was carried out, and the flight into gang territory where other gang members could witness appellant and Gonzalez's actions. As to the substantive offenses, the evidence against appellant was strong, as mentioned above. A police officer saw him outside of the liquor store moments after gunshots were fired, appellant and Gonzalez fled by car and by foot, an apartment resident saw someone matching appellant's description burying a gun, appellant was apprehended moments later and was streaked with dirt and out of breath as if he had been running, and the gun that was buried matched the bullet fragments from Beverly's neck. There is no indication that absent the gang expert's statement—"It was used with a gun

so the tendency for murder is very high”—that a jury was any less likely to find appellant guilty of the crimes charged or the enhancements alleged.

B. Failure to Object to Alleged Prosecutorial Misconduct

Appellant further asserts his counsel was deficient for failing to object to alleged prosecutorial misconduct. The alleged misconduct was the prosecutor’s explanation of the presumption of innocence. We find no prosecutorial misconduct and further conclude that even if the prosecutor’s comments were improper, counsel’s failure to object was not prejudicial.

During voir dire, the prosecutor questioned one prospective juror about the presumption of innocence. The prosecutor described the presumption by analogy:

“[PROSECUTOR]: . . . Now, this whole presumption of innocence we’ve been talking about keep in mind there is nothing really magical about these presumptions. For example, if you notice, this courtroom has no windows. If Judge Daigh here told you it was sunny outside, you would presume it would be sunny outside, correct?”

“[PROSPECTIVE JUROR]: Unless I knew otherwise.

“[PROSECUTOR]: Right. Without being able to see outside and he tells you it’s sunny, you would presume it’s sunny, correct?”

“[PROSPECTIVE JUROR]: Uh-huh.

“[PROSECUTOR]: Say you walked out into the hallway and saw it was raining cats and dogs. Now, you know the evidence has shown you otherwise that in fact it’s raining, right?”

“[PROSPECTIVE JUROR]: Right.

“[PROSECUTOR]: So the presumption dissolves when the evidence shows you otherwise, correct?”

The prosecutor returned to this theme during her closing argument:

“Now, the charts that you were shown about beyond a reasonable doubt and presumption of innocence in the beginning of trial, we had told you defendants are presumed innocent until proven guilty, that’s exactly what you should have presumed during voir dire when you were asked about your occupation, about your biases, prejudices or sympathies. You might have -- you were also asked if you were to go into the jury room right

now, how would you vote. It was not guilty because you had not yet heard any evidence. It also told you there's nothing magical about the presumption of innocence. The example I gave you was if the judge told you it was raining outside, you would have to presume it was true because there were no windows in the courtroom. But if you go out into the hallway and looked in the hallway and saw it was bright and sunny, now you have evidence that it's not raining and that presumption that it was raining has been destroyed. It's the same in the courtroom. You had to presume they were innocent because you hadn't heard any evidence. Now you've heard the evidence, that presumption can no longer hold."

Appellant's counsel did not object during voir dire or the summation.

" "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

The prosecutor's statements did not misrepresent the nature of the presumption of innocence. The presumption of innocence lasts throughout the trial and must be weighed by the jury along with all of the other evidence. (*People v. Morales* (1967) 252 Cal.App.2d 537, 545.) But once all of the evidence is presented, it is the jury's job not to blindly hold on to the presumption, but rather to decide whether the evidence has defeated the presumption beyond a reasonable doubt. Appellant's assertion that the jury must presume the defendant is innocent until it renders a guilty verdict is incorrect, since the jury's entire purpose is to make a determination of guilt or innocence in order to render a verdict. (*People v. Bender* (1933) 132 Cal.App. 753, 762 [the presumption of innocence remains throughout the trial, but the "presumption does not of itself destroy the effect of evidence which is in itself satisfactory"].)

We find equally unavailing appellant's argument that the prosecutor's comments improperly allowed the jury to come to a conclusion before deliberations began, and before the parties presented all of the evidence or the court instructed the jury. The

prosecutor's comments did not suggest that the jurors could come to a decision before hearing all of the evidence. Rather, the comments were not so different from section 1096 which states: "A defendant in a criminal action is presumed to be innocent until the contrary is proved"

Even if the prosecutor's statements regarding the presumption of innocence were misleading and counsel was deficient for failing to object, we would not conclude the failure was prejudicial. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008 (*Mesa*) [reviewing court may examine prejudice without first determining if counsel's performance was deficient].) The trial court instructed the jury about the presumption of innocence. Before voir dire began, the court instructed the jury that the presumption of innocence meant "when someone is arrested or charged with a crime or brought to trial, he or she is presumed to be innocent unless the contrary is proved here at trial." Before the parties gave opening statements, the trial court instructed the jurors that they were not to be biased against a defendant because he was arrested, charged with a crime or brought to trial, and further that none of those circumstances was evidence of guilt. The court informed the jury that the court's instructions were the law, and if the lawyers said anything in their arguments that conflicted with the court's instructions, the jury was to follow the court's instructions. The court told the jury the parties had "a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict." At the end of the trial, the court again instructed the jury on the presumption of innocence: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . . [¶] . . . [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial."

Given these accurate and comprehensive instructions from the trial court, even if the prosecutor's statements were a misinterpretation of the presumption of innocence, and appellant's counsel should have objected, appellant has not demonstrated a reasonable probability the outcome of his trial would have been different absent counsel's error.

(*People v. Gray* (2005) 37 Cal.4th 168, 217 [even if prosecutor's statements misconstrued the law, court would presume the jury followed the instruction that if attorney statements conflicted with the law as the court had explained it, the jury was to follow the court's instructions]; *Mesa, supra*, 144 Cal.App.4th at pp. 1010-1011 [failure to object during prosecution's closing argument was not prejudicial].)

III. Substantial Evidence Supported the Gang Enhancements

Appellant additionally contends substantial evidence did not support the jury's true findings on the gang enhancements. We disagree. We review a jury's findings on gang enhancements for substantial evidence. We view the evidence in the light most favorable to the judgment and do not resolve evidentiary conflicts or credibility issues. We will not reverse the jury's findings unless “ ‘ ‘upon no hypothesis whatever is there sufficient substantial evidence to support’ ” the jury's verdict. [Citation.]” (*Zamudio, supra*, 43 Cal.4th at p. 357; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

Under section 186.22, subdivision (b)(1), a person convicted of a felony committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members,” is properly subject to its additional punishment. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 106, 108.)

Here, substantial evidence supported the gang enhancements. There was evidence that appellant was a gang member, as was Gonzalez. Although the defendants were not members of the same gang, the gang expert testified their respective gangs were allies and it was common for members of the two gangs to commit crimes together. As explained in *People v. Villalobos, supra*, 145 Cal.App.4th at page 322, committing a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent required under section 186.22.

The gang expert offered additional perspective on the facts that indicated the shooting was for the benefit of, at the direction of, or in association with a criminal street gang. The shooting occurred in an area that members of different gangs frequent. The gang expert testified that a shooting in the middle of the day in this area would benefit

appellant's gang by demonstrating a certain brazenness and by intimidating the neighborhood. Further, before the two men were caught, they drove around an apartment complex where members of Gonzalez's gang often gathered; appellant then fled by foot through the same complex. The gang expert opined appellant's actions in evading a police officer in the middle of the day, in the middle of gang territory, would garner notoriety for his gang. The expert also indicated assaults with deadly weapons and attempted murders were primary activities of appellant's gang.

Appellant relies on three cases to support his argument that the evidence adduced in this case was insufficient to support the gang enhancements: *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*), and *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). These cases do not mandate reversal of the gang allegations here. For example, in *Ramon*, police stopped the defendant, a gang member, in a stolen car. Police found a handgun under the driver's seat of the car. A fellow gang member was riding in the passenger's seat. (*Ramon, supra*, at p. 847.) The defendant was charged with receiving stolen property, being a felon in possession of a firearm, possessing a firearm while an active gang member, and carrying a loaded firearm in public for which he was not the registered owner. Gang enhancements were alleged as to each count. (*Id.* at p. 848.) A gang expert testified that police stopped the defendant in the heart of his gang's territory and that car theft was one of the gang's seven primary activities. The expert further testified that the defendant's possession of a stolen vehicle and possession of a weapon would benefit the gang because the auto and weapon could possibly be used to commit *future* gang-related crimes. (*Id.* at pp. 847-848.)

The reviewing court found there was insufficient evidence to support a conclusion that the defendant was acting on behalf of his gang in possessing a stolen vehicle or a handgun, or that he committed the crimes with the specific intent to promote, further, or assist criminal conduct by gang members. (*Ramon, supra*, 175 Cal.App.4th at p. 851.) The court characterized the gang expert's testimony as mere speculation; although the expert opined the defendant's motive might have been to use the stolen vehicle and

firearm in furtherance of gang crimes, there was no evidence to support that opinion. The expert did not indicate that possessing stolen vehicles was one of the gang's primary activities. (*Id.* at p. 853.)

Similarly, in *Frank S.*, the minor defendant, a gang member, was charged with possession of a concealed weapon and an accompanying gang enhancement. A gang expert testified the minor's possession of a knife benefitted his gang because it would help gang members protect themselves should they be assaulted by rival gangs. (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1195.) There was no evidence that the minor was in gang territory, had gang members with him, or had any intent to use the knife in a gang-related offense. (*Id.* at p. 1199.) The reviewing court concluded substantial evidence did not support the specific intent element of the gang enhancement and reversed the finding. (*Ibid.*)

Killebrew does not concern the evidence needed to support a gang enhancement finding under section 186, subdivision (b)(1). Instead, the case provides an example of improper expert testimony. As evidence on the substantive charge of conspiracy to possess a handgun, the prosecution offered the testimony of a gang expert. The expert testified that “when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun.” (*Killebrew*, *supra*, 103 Cal.App.4th at p. 652, fn. omitted.) The reviewing court found the testimony was improper because it was expert testimony that a specific individual had specific knowledge or possessed a specific intent. The court distinguished this form of testimony from expert opinion on the “expectations of gang members in general when confronted with a specific action.” (*Id.* at p. 658, italics omitted.)

This case differs significantly from those described above. In contrast to the defendants in *Ramon* and *Frank S.*, appellant was not merely stopped by police while in possession of some form of contraband. Instead, he was arrested after he was surprised by a police officer while outside the scene of a violent crime—a shooting which caused great bodily injury—and after he was observed burying the gun used in the shooting and fleeing. Rather than speculating about how appellant might have intended to use a

weapon for *future* gang-related activity as in *Ramon* and *Frank S.*, the expert in this case opined about the characteristics of the shooting that led her to believe it was a crime conducted to benefit a gang. The expert additionally testified that appellant's gang's primary activities included assaults with deadly weapons and attempted murders, the crimes at issue in this case. Unlike the defendant in *Frank S.*, appellant was in the car with a member of an allied gang, the two fled to gang territory and evaded police in that territory, and the evidence indicated they conducted the shooting together. Finally, unlike the expert in *Killebrew*, the expert did not state appellant's specific intent, and the hypothetical presented to her was grounded in the facts of the case as established at trial.

Substantial evidence supported the jury's true findings on the gang enhancements.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.